IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 729.

HARRY THEIS, WYLLYS K. BLISS and W. L. HAGER, Not Individually But as the Bondholders' Protective Committee in the Matter of Certain Bonds of Grand River Drainage District of Livingston and Linn Counties, Missouri, the Original Petitioner, and EVERT G. CULLING, GLENN B. SCHAFFNER and B. F. BARNHART, the (Proposed) Interveners,
Petitioners,

against

DURWARD BELMONT LUTHER, Alleged Bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and Associate Justices of the United States:

Harry Theis, Wyllys K. Bliss and W. L. Hager, not individually but as the Bondholders' Protective Committee in the matter of certain bonds of Grand River Drainage District of Livingston and Linn Counties, Missouri, the original petitioner, and Evert G. Culling, Glenn B. Schaffner and B. F. Barnhart, the (proposed) interveners, in the above-entitled case, respectfully pray the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an opinion and

judgment of the Circuit Court of Appeals for the Eighth Circuit rendered herein on October 29, 1945 (R. pp. 221, 226), which affirmed an order entered by the United States District Court for the Western Division of the Western District of Missouri on April 21, 1945 (R. 184), confirming an order (R. 59) of the Referee, dated October 4, 1944, dismissing the second amended petition of the original petitioner for the adjudication of respondent, Durward Belmont Luther, as a bankrupt (R. 30), and an order (R. 160) of the Referee, dated December 4, 1944, sustaining the respondent's motions (R. 80, 82) to strike (1) the original petitioner's motion for a new trial (R. 60); (2) a joint motion (R. 63) of the original petitioner and interveners, Culling and Schaffner, and (3) a joint motion (R. 73) of the original petitioner and intervener, Barnhart, to vacate said order of dismissal and to grant said interveners leave to intervene and join in the original petition for adjudication.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 151 Fed. (2d), at page 397, and appears on pages 221 to 226 of the transcript of the record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Bondholders' Protective Committee on July 27, 1944, as the sole petitioning creditor, with claims aggregating $60,862.45, instituted an involuntary proceeding, alleging that the creditors of respondent were less than 12 in number (R. 30, 31). Respondent was the petitioner's field agent to develop sales for lands acquired by it in Grand River Drainage District through foreclosure sales of the drainage tax liens securing the bonds held by it, with authority to develop sales and recommend to it,

based upon his knowledge of the highest and best prices available, as to acceptance or rejection by it of offers to purchase such lands resulting from his efforts (R. 31). The respondent, in his answer (R. 42) scheduled his assets at $278,500.00, listed 22 unsecured creditors (R. 49) and moved for dismissal on the ground that his creditors were more than 12 in number. 16 of these creditors held small claims for current accounts (R. 49, 53). The 16 claims aggregate $340.02 or .0056 of the petitioner's claims. None of these claims exceed $45.00 in amount; 13 are for less than $30.00 and 6 are for less than $12.00 each. As to nature, 4 are for groceries and meat, 7 are for repairs and service, 2 are for medical bills and drugs, 1 is for clothing, 1 is for jewelry and the other is for balance due on a mule. The claims of 11 of the 16 creditors last mentioned aggregate but $161.33 (the largest of which is $28.69), or .0027 of the petitioner's claims. If the above 16 small-current-account creditors, or even the last mentioned 11 of them, are not counted, then his creditors are less than 12 in number. The petitioner contended that these small-current-account creditors should not be counted under the Bankruptcy Act as amended by the Chandler Act of 1938. The Referee gave notice (R. 53) of the pendency of the proceeding and of a hearing, to the listed creditors. At the hearing no additional creditors appeared and joined in the petition. The Referee held (R. 52) that these small-current-account creditors should be counted in computing the total number of creditors and on October 4, 1944, ordered the proceeding dismissed (R. 59).

The claims of the three interveners, Barnhart, Culling and Schaffner (land purchasers), are each quasi-contractual for money had and received (Ex. A, R. 66; Ex. B, R. 69; Ex. A, R. 76).

The gravamen of each claim is that the respondent was fraudulent to the intervener in extracting money from

him for a non-existent contract (R. 66, 69, 76). Affidavits filed by the interveners in support of their claims show that the respondent was furnished by his principal with forms (used in each transaction) of sale contracts. The Committee took title to the lands as it acquired them in the name of its field agent, and the Committee, when and if it executed any such contract, agreed to have its field agent convey the land sold by quit-claim deed, subject to the other terms of the sale contract (R. pp. 91, 115, 139). The deeds recited as the consideration therefor the "sum of one dollar" (R. pp. 107, 131), or "the sum of one dollar and other valuable considerations" (R. 151).

These forms of sale contracts expressly provided that, although the instrument was to be first signed by the intervener, the proposed sale contract would not become binding upon the Committee until personally signed by the Committee (R. pp. 97, 121, 143).

In the transaction with each intervener the respondent extracted from him a sum of money in excess of the sale price fixed by the Committee, by presenting to the intervener a false sale contract which included such excess sum as part of the Committee's purported sale price. This false sale contract was produced by respondent connecting together different parts of two several genuine instruments, i. e., the respondent withdrew page 2 (which recited the smaller sum as the sale price) from the genuine instrument signed by the Committee, and produced the false sale contract by connecting together with the remaining pages of the instrument signed by the Committee, page 2 (which contained the larger sum as the sale price) previously withdrawn by him from the genuine instrument which had been signed by the intervener (R. pp. 85-105, incl.; 111-129, incl.; 135-149, incl.). This excess sum the respondent pocketed and still holds.

In each transaction the money pocketed by respondent was from the cash down payment, as follows:

In Culling's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $1485.00, of which $495 was the down payment and $990 was deferred in notes (R. p. 117). Page 2 of the instrument signed by the Committee recited the sale consideration at $990.00, all deferred in notes (R. p. 125). Culling's claim is for the $495.00 down payment pocketed by respondent (R. 66).

In Schaffner's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $940.00, of which $550.00 was the down payment and $390.00 was deferred in notes (R. p. 93). Page 2 of the instrument signed by the Committee recited the sale consideration at $470.00, of which $80.00 was the down payment and $390.00 deferred in notes (R. p. 101). Schaffner's claim is for the $470.00 of the $550.00 down payment pocketed by respondent (R. p. 69).

In Barnhart's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $840, all cash (R. p. 141). Page 2 of the instrument signed by the Committee recited the sale consideration at $400.00 (R. p. 147). Barnhart's claim is for the $440.00 pocketed by respondent (R. p. 76).

The respondent did not include the interveners in his list of creditors filed with his answer (R. 49). They received no notice of the pendency of the proceeding and had no opportunity to be heard (R. 157). Within 10 days after the entry of the order of dismissal, to wit: on October 13, 1944, the original petitioner filed its motion for a new trial (R. 60) under rule 59 of the Rules of Civil Procedure, alleging that since the dismissal it had discovered that interveners Culling and Schaffner were creditors of the bankrupt; that the respondent had not listed them as creditors, that they had received no notice of the pendency of the proceeding, that they desired to intervene and join in the petition for adjudication and

that the respondent's failure to list interveners wrongfully deprived the petitioner of its substantial right to negotiate with and solicit interveners to intervene and join in the original petition. Also, on October 13, 1944, interveners Culling and Schaffner filed their joint motion (R. 63), in which the original petitioner joined, alleging that they were creditors of the respondent for money had and received; that they had not been listed and had received no notice of the pendency of the proceeding or opportunity to be heard and praying that the order of dismissal be vacated and that leave be granted to them to file their intervening petitions (R. 66 and 69), which were presented with the joint motion. On October 26, 1944, a similar motion (R. 73) was filed by intervener Barnhart (in which the original petitioner joined) to which his intervening petition (R. 76) was attached. The respondent filed motion (R. 80) to strike the motion for new trial, and motion (R. 82) to strike the joint motions (R. 63, 73). Upon a hearing the Referee ruled (R. 160) that the interveners were not creditors of the respondent and he denied petitioners' motions and sustained the respondent's motions to strike.

The Referee ruled the issue solely upon the pleadings and the supporting affidavits (R. 59, 161). No testimony was heard by him.

The District Court with memorandum opinion not reported, but which appears on page 179 et seq. of the record, affirmed both orders of the Referee (R. 184).

If small-claim-current-account creditors are not to be counted in computing the total number of creditors, or if interveners are creditors, the proceeding should not have been dismissed.

BASES OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 24, c, of the Bankruptcy Act (11 U. S. C. A., Sec. 47, c), and Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

The opinion and judgment of the Circuit Court of Appeals herein were filed on October 29, 1945 (R. 222). The petitioners filed their petition for rehearing on November 13, 1945 (R. 227), which petition was denied on December 5, 1945 (R. 261). On December 14, 1945, the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioners' Application for Writ of Certiorari (R. 261).

QUESTIONS PRESENTED.

First: In determining whether the bankrupt's creditors are less than 12 in number, where a sole petitioner has instituted a proceeding under Sec. 59 (b) [11 U. S. C. A., Sec. 95 (b)] of the Bankruptcy Act, are creditors having small claims for current accounts to be counted?

(a) In holding that such creditors are to be counted does not the decision of the Court of Appeals seriously impair, if not destroy, the right of a sole petitioner under Sec. 59 (b) to maintain an involuntary proceeding in bankruptcy?

(b) Does not such decision enable the holders of small-current-account claims, with little at stake, to prevent bankruptcy administration of a debtor's estate, and thereby to defeat the interest of a substantial creditor contrary to the spirit of the Chandler Act?

(c) Are not the challenged current-account-claims too small for the law's protection?

(d) Are not the claims of small-current-account credi-

tors secured claims, for all intents and purposes of the Bankruptcy Act, and therefore expressly excluded under Sec. 59 (e) (4)?

(e) Is not the holding of the Court of Appeals that the express exclusions in Sec. 59 (e) prevents the exclusion of small-current-account creditors not so expressly excluded, in conflict on the same matter with the decisions of the First Circuit Court of Appeals in Myron M. Navison Shoe Co. v. Lane Shoe Co. (C. C. A. 1st, 1929), 36 Fed. (2d) 454, 457, and in Leighton v. Kennedy (C. C. A. 1st, 1904), 129 Fed. 737, 739, and of the Tenth Circuit Court of Appeals in International Shoe Co. v. Smith-Cole, Inc. (C. C. A. 10th, 1933), 62 Fed. (2d) 972, 974?

(f) Is not the decision of the Court of Appeals that unsubstantial claims are cognizable in the count of creditors in conflict with the decision of the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 F. 737, 740?

Second. Where the seller's agent retains money which he has obtained through fraud from the purchaser in the sale of land, does the purchaser have a provable claim against the agent under Sec. 63 (a) (4) [11 U. S. C. A., Sec. 103 (a) (4)] of the Bankruptcy Act?

(a) Is not the decision that it is not a fraud upon a third person, and, therefore, not actionable by the third person against the agent, for the agent to accept money from the third person upon the agent's misrepresentation that his principal had signed a contract, in conflict with

(i) applicable local decisions in Carson v. Woods (Mo. Sup., 1915), 177 S. W. 623, 626, and McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 678, and with applicable general law as set forth in the accompanying brief, as to the unsigned instrument being a contract; and,

(ii) applicable local decisions in McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 677; Hays v. Smith (Mo. Sup., 1919), 213 S. W. 451, 454, and Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589, and with applicable general law as set forth in the accompanying brief, as to the agent being fraudulent to the third person in accepting money for a non-existent contract.

(b) Is not the decision that the agent's duty to account to his principal, even though not performed, protects the agent against liability for his fraud committed upon the third person, in conflict with applicable local decisions in Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Patzman v. Howey, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, and Tillman v. Bungenstock (1914), 185 Mo. A. 66, 68, 171 S. W. 938, 939, and with applicable general law as set forth in the accompanying brief?

(c) Is not the decision that where a third person has paid money to an agent under false inducement, the third person may not elect to make claim against the agent for money had and received under Sec. 63 (a) (4) of the Bankruptcy Act, rather than in tort for damages, in conflict with

(i) applicable local decisions in Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535; McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675, and Webster v. Sterling Finance Co., 351 Mo. 754, 757, 173 S. W. (2d) 928, 931, and with applicable general law as set forth in the accompanying brief;

(ii) the decision on the same matter of the Second Circuit Court of Appeals in In Re International Match Corp. (C. C. A. 2d, 1934), 69 Fed. (2d) 73, 75; and,

(iii) applicable decision of this Court in Crawford v. Burke, 195 U. S. 176, 193, 25 S. Ct. 9, 49 L. Ed. 147, 154?

(d) Is not the decision that the principal rather than the interveners are entitled to proceeds of the fraud perpetrated by the agent on the interveners, where, as here, the agent was the "Sole Actor," in conflict with

(i) the decisions on the same matter of the 2nd, 5th, 7th and 10th Circuit Courts of Appeals in Munroe v. Harriman (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657; Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969; Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519, 521; and Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530;

(ii) applicable decisions of this Court in Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 224, 43 S. Ct. 570, 573, 67 L. Ed. 956, 960; and Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 637, 20 S. Ct. 498, 44 L. Ed. 611, 618; and,

(iii) applicable local decision in Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535?

(e) Is not the decision that damages are essential to the third person's claim for restitution in conflict with

(i) applicable local decision in First National Bank v. Produce Exchange Bank (1935), 338 Mo. 91, 99, 89 S. W. (2d) 33, 38, and with applicable general law as set forth in the accompanying brief; and

(ii) the decision on the same matter of the Second Circuit Court of Appeals in Second National Bank of Toledo v. M. Samuel & Sons (C. C. A. 2nd Cir., 1926), 12 Fed. (2d) 963, 967?

Third: Whether in determining the provability of interveners' claims, local law or Federal law is controlling?

REASONS RELIED ON FOR ALLOWING THE WRIT.

A. As to First Question Presented:

I.

In holding that small claims for current accounts should be counted in determining whether the bankrupt's creditors are less than 12 in number, where a sole petitioner has instituted an involuntary proceeding under Section 59 (b) of the Bankruptcy Act, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Neither this Court nor any Court of Appeals, save the Court below, has decided this question.

The question involves the right of a single creditor to institute an involuntary proceeding when otherwise three petitioning creditors are required. This right was contained in the first Bankruptcy Act of 1800, renewed in the Act of 1841, and has been continued under varying conditions in all the subsequent Acts. It is one of the most important rights on the creditor side of the Bankruptcy Act.

(a) The lower Courts are divided as follows:

Decisions excluding small-current-account Creditors:

W. A. Gage & Co. v. Bell (D. C. Tenn., 1903), 124 Fed. 371, 377;

In re Blount (D. C. Ark., 1906), 142 Fed. 263, 269;

Matter of Burg (D. C. Texas, 1917), 245 Fed. 173, 174;

Matter of Branche (D. C. N. Y., 1921), 275 Fed. 555, 557;

Security Bank and Trust Co. v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701.

Decisions including small-current-account Creditors:

Matter of Alden (D. C. Mass., 1924), 2 Fed. (2d) 61, 62;

Matter of Hall (D. C. Penn., 1928), 27 Fed. (2d) 999, 1000;

Grigsby-Grunow Co. v. Hieb Radio Supply Co. (C. C. A. 8th, 1934), 71 Fed. (2d) 113;

In re Murray, 14 Fed. Sup. 146, 147.

(b) The decision of the Court of Appeals seriously impairs, if not destroys, this right.

A number of small-current-account creditors are usually present in every case. If they are to be counted, the right of a sole petitioner to maintain an involuntary proceeding is illusory.

House Committee on the Judiciary, Report No. 1409, pp. 14, 17, accompanying H. R. 8046 (the Chandler Bill), 96th Congress, First Session, July 29, 1937;

Commerce Clearing House, Bankruptcy Law Service, Law Compilation, 3rd Ed., p. 4043, par. 5543.

(c) The decision of the Court of Appeals enables the holders of small-current-account claims with little at stake to prevent the administration in bankruptcy of a debtor's estate and thereby to defeat the interests of a substantial creditor, contrary to the spirit of the Chandler Act.

Report No. 1409, supra.

(d) The Court of Appeals for the Eighth Circuit has ruled inconsistently as to the effect to be given to small claims.

In Houchin Sales Co. v. Angert (C. C. A. 8th, 1906), 11 Fed. (2d) 115, the Court refused to recognize a transfer of $50 as a preferential transfer constituting an Act of

Bankruptcy and applied the maxim, de minimis non curat lex. However, in Grigsby-Grunow Co. v. Hieb Radio Supply Co. (C. C. A. 8th, 1934), 71 Fed. (2d) 113, the Court held that small-current-account claims should be counted in determining the total number of the bankrupt creditors, and refused to apply the above maxim.

(e) The Court of Appeals for the Eighth Circuit has ruled inconsistently in construing the effect of the express exclusions set out in Section 59 (e) of the Act.

In Stevens v. Nave-McCord Mercantile Co. (C. C. A. 8th, 1906), 150 Fed. 71 (where the proceeding was instituted by a sole petitioner), the Court refused to include in the count creditors who had received preferential transfers, before such creditors were expressly excluded under Section 59 (e) of the Act. However, the Court in Grigsby-Grunow Company v. Hieb Radio Supply Co., supra, included small-current-account creditors in the count because they were not expressly excluded by Section 59 (e). In the latter case the Court applied the maxim, expressio unius est exclusio alterius, but refused to apply it in the former case.

(f) The better reasoned decisions exclude from the count small-current-account creditors in determining the total number of creditors, because such creditors are practically secured creditors and their lack of interest restrains them from joining against their debtor.

In re Blount (D. C. Ark., 1906), 142 Fed. 263, 269;
Matter of Burg (D. C. Texas, 1917), 245 Fed. 173, 174;
Matter of Branche (D. C. N. Y. 1921), 275 Fed. 555, 557;
Security Bank and Trust Co. v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701;
W. A. Gage & Co. v. Bell (D. C. Tenn., 1903), 124 Fed. 371, 377.

(g) The significance of the amount of creditors' current-account claims is a relative matter dependent upon the financial status of the debtor, and the small-current-account claims challenged in the case at bar should be excluded.

Security Bank and Trust Company v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701.

II.

In holding that the express exclusion in Sec. 59 (e) of certain classes of creditors prevents the exclusion of any class not so expressly excluded, the Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

The First Circuit Court of Appeals in Myron M. Navison Shoe Co. v. Lane Shoe Co. (C. C. A. 1st, 1929), 36 Fed. (2d) 454, 457, and in Leighton v. Kennedy (C. C. A. 1st, 1904), 129 Fed. 737, 739, and the Tenth Circuit Court of Appeals in International Shoe Co. v. Smith-Cole, Inc. (C. C. A. 10th, 1933), 62 Fed. (2d) 972, 974, by excluding preferred creditors, in effect held that the express exclusions in Sec. 59 (e) did not prevent the exclusion of other classes of creditors before such other classes were expressly enumerated in Sec. 59 (e).

III.

In holding that creditors having unsubstantial claims should be counted the Court of Appeals has rendered a decision in conflict with the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 F. 737, 739, where such claims were excluded from the count.

IV.

Proper administration of the Bankruptcy Act warrants this Court in settling the question.

Until this Court settles this question the right of a sole petitioner under Sec. 59 (b) is fraught with such peril from these small-current-account creditors "usually" present as to be practically unavailable and the counting of creditors under 59 (d) and (e) is futile. The elaborate procedure set up for counting creditors becomes useless if small-current-account creditors are to be counted.

B. **As to Second Question Presented:**

I.

In holding that the interveners have no provable claims under Section 63 (a) (4) of the Bankruptcy Act, the Court of Appeals has decided an important question of local law, in a way probably in conflict with applicable local decisions, in that:

(a) Its ruling that respondent committed no fraud upon interveners is in conflict with McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 677; Hays v. Smith (Mo. Sup., 1919), 213 S. W. 451, 454, and Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589. He took money for a non-existent contract.

Its ruling is also in conflict with the following applicable general law:

Lear v. Bawden (1924), 75 Colo. 385, 387, 225 Pac. 831;

Kilgore v. Bruce (1896), 166 Mass. 136, 138, 44 N. E. 108, 109;

Isenbeck v. Burroughs (1914), 217 Mass. 537, 539, 105 N. E. 595, 596;

Hokanson v. Oatman (1911), 165 Mich. 512, 517, 131 N. W. 111, 113;
Stevens v. Reilly (1916), 56 Okla. 455, 462, 156 Pac. 157, 159;
Cook v. Skinner (1908), 50 Wash. 317, 319, 97 Pac. 234, 235;
Collins v. Philadelphia Oil Co. (1924), 97 W. Va. 464, 470, 125 S. E. 223, 225;
Estes v. Crosby (1920), 171 Wis. 73, 79, 175 N. W. 933, 935;
2 Restatement, Law of Agency, 763, Sec. 348, Comment (d).

(b) Its ruling that a contract existed between interveners and the Committee is in conflict with Section 4587, R. S. Mo. 1939, defining forgery, and with Carson v. Woods (Mo. Sup., 1915), 177 S. W. 623, 626, and McClure v. H. R. Ennis R. E. and Inv. Co., 219 Mo. App. 112, 120, 268 S. W. 675, 678.

Its ruling is also in conflict with the following applicable general law:

Vickrey v. Ritchie (1909), 202 Mass. 247, 249, 88 N. E. 835, l. c. 835;
Dock Contractor Co. v. Niagara Falls Power Co. (D. C. N. Y., 1921), 274 Fed. 852, 855;
Nelson v. Rohweder (1920), 147 Minn. 325, 328, 180 N. W. 223, 225;
6 Williston on Contracts (Rev. Ed. 1938), 5352, Sec. 1913;
2 C. J., Alteration of Instruments, 1224, Sec. 91.

(c) Its ruling that the interveners have no independent claims against respondent, and that respondent is liable only to his principal, is in conflict with Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Patzman v. Howey, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, and Tillman v. Bungenstock (1914), 185 Mo. A. 66, 68, 171 S. W. 938, 939.

Its ruling is also in conflict with the following applicable general law:

3 C. J. S., Agency, 129, Sec. 220;
2 Restatement, Law of Agency, 760, Sec. 348;
Note in 82 A. L. R. 312 (1933);
Peterson v. McManus (1919), 187 Ia. 522, 547, 172 N. W. 460, 469;
Inland Waterways Corp. v. Hardee (App's. Dist. Col. 1938), 100 Fed. (2d) 678, 685;
Bocchino v. Cook (1902), 67 N. J. L. 467, 468, 51 Atl. 487;
Phetteplace v. Bucklin (1893), 18 R. I. 297, 300, 27 Atl. 211, 212;
Moore v. Shields (1889), 121 Ind. 267, 273, 23 N. E. 89, 91;
Hardy v. American Export Co. (1902), 182 Mass. 328, 329, 65 N. E. 375, 376, 59 L. R. A. 731, 732;
Alexander v. Coyne (1915), 143 Ga. 696, 698, 85 S. E. 831, 832, L. R. A. 1916 D, 1039, 1041;
Hoining v. Federal Reserve Bank (C. C. A. 8th, 1931), 52 Fed. (2d) 382, 387, 82 A. L. R. 297.

(d) Its ruling that interveners may not elect to claim for money had and received rather than in tort is in conflict with Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535; McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675, and Webster v. Sterling Finance Co., 351 Mo. 754, 757, 173 S. W. (2d) 928, 931.

Its ruling is also in conflict with the following applicable general law:

Isenbeck v. Burroughs (1914), 217 Mass. 537, 105 N. E. 595;
Hokanson v. Oatman (1911), 165 Mich. 512, 131 N. W. 111;
Cook v. Skinner (1908), 50 Wash. 317, 97 Pac. 234;

Crawford v. Burke (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147;
Restatement, Restitution, 673, Sec. 166.

(e) Its ruling that interveners have no claims unless they have suffered damages is in conflict with First National Bank v. Produce Exchange Bank (1935), 338 Mo. 91, 99, 89 S. W. (2d) 33, 38.

Its ruling is also in conflict with the following applicable general law:

Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc. (S. D. N. Y., 1920), 268 Fed. 575, 582;
Caskie v. Philadelphia Rapid Transit Company (1936), 321 Pa. 157, 161, 184 Atl. 17, 19, 106 A. L. R. 318, 321;
Second National Bank of Toledo v. M. Samuel & Sons (C. C. A. 2nd Cir., 1926), 12 Fed. (2d) 963, 967;
Heywood v. Northern Assurance Co. (1916), 133 Minn. 360, 366, 158 N. W. 632, 634;
Bates-Farley Sav. Bank v. Dismukes (1899), 107 Ga. 212, 219, 33 S. E. 175, 178;
Bosworth v. Wolfe (1928), 146 Wash. 615, 623, 264 Pac. 413, 417;
Duplate Corp. v. Triplex Safety Glass Co. (1936), 298 U. S. 448, 457, 56 S. C. 792, 796, 80 L. Ed. 1274, 1281;
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co. (1916), 240 U. S. 251, 259, 36 S. Ct. 269, 272, 60 L. Ed. 629, 634.

II.

In holding that interveners may not elect to claim for money had and received — under the Implied Contract Clause of Section 63 (a) (4) of the Bankruptcy Act — the Court of Appeals has rendered a decision in conflict with the following decision of another Circuit Court of Appeals on the same matter:

In re International Match Corp. (C. C. A. 2d, 1934), 69 Fed. (2d) 73, 75,

and has decided a Federal question in a way probably in conflict with the following applicable decision of this Court:

Crawford v. Burke, 195 U. S. 176, 193, 25 S. Ct. 9, 49 L. Ed. 147, 154.

III.

In holding that the principal rather than the interveners is entitled to proceeds of the fraud perpetrated by the agent on the interveners, the Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (under the "Sole Actor" Doctrine, the Committee, had it received the money from the agent, could claim title only by virtue of respondent's fraud, and would have to accept it burdened with respondent's knowledge of the defect in title), as follows:

Munroe v. Harriman (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657;

Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969;

Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519, 521;

Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530;

with the following applicable decisions of this Court:

Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 224, 43 S. Ct. 570, 573, 67 L. Ed. 956, 960;

Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 637, 20 S. Ct. 498, 44 L. Ed. 611, 618;

and with the following applicable local decision:

Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535.

C. **As to Third Question Presented:**

In order to avoid confusion in the administration of the Bankruptcy Act, this Court should settle whether local law or Federal law is controlling in determining the provability of interveners' claims. It is believed that the one or the other is controlling, and therefore the exercise of this Court's power of supervision is called for to avoid departure by the Court of Appeals from the law controlling.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 78, 58 S. C. 817, 822, 82 L. Ed. 1188, 1194;

Guaranty Trust Co. v. York (June 18, 1945, not yet officially reported), 89 L. Ed. 1418, 65 S. C. 1464, 1470.

PRAYER.

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that a Writ of Certiorari issue out of this Court to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the Record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that

this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may be proper.

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January 9, 1946.